82-1273

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MAINE,
Petitioner

V.

RICHARD THORNTON,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUE THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER V. UNITED STATES, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), WAS INAPPLICABLE TO THE INSTANT CASE, WHEREIN A WARRANTLESS SEARCH OCCURRED IN A HEAVILY WOODED AREA OF MR. THORNTON'S 38-ACRE RURAL PROPERTY WHICH WOODED AREA IS BEYOND THE CURTILAGE OF AND NOT VISIBLE FROM MR. THORNTON'S HOUSE, JUST BECAUSE NO TRESPASSING AND NO HUNTING SIGNS, AN OLD STONE WALL, AND AN OLD BARBED WIRE FENCE DOT THE PERIMETER OF MR. THORNTON'S PROPERTY?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, Decision No. 3103 (Decided December 6, 1982), denying the State's appeal from a Maine Superior Court order suppressing marijuana seized from Mr. Thornton's property, is not yet officially reported and is reproduced in Appendix A to this Petition. The Maine Superior Court suppression order is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, Decision No. 3103 (Decided December 6, 1982), was entered on December 6, 1982, and the Court's mandate was issued on the same day. Petitioner has timely filed this petition for a writ of certiorari

within the sixty-day filing period set forth in U.S.Sup.Ct. Rule 20.1.

Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the basis of an informant's tip received on July 31, 1981 that marijuana was growing in a heavily wooded area behind a mobile home on the Davis Corner Road in Hartland, Maine (S.H.T. at 6-7)[1], Maine

[1]References to pages of the court reporter's transcript (Rule 39(b), Maine

State Police Trooper Carroll E. Crandall and Hartland Constable Harold Hartford drove to the mobile home on August 3, 1981 between approximately 10:00 a.m. and 11:00 a.m. (S.H.T. at 16), parked their automobile in front of the mobile home (S.H.T. at 11), and walked between the mobile home and a house occupied by Linwood Leavitt to the heavily wooded area immediately behind the two residences. (S.H.T. at 6-7, 9, 23, 27, 32 (Trooper Crandall); 57-59 (Constable Hartford)). At this point the officers saw and followed a footpath into the heavily wooded area until they came across a clearing near the footpath wherein marijuana plants were growing in two patches. (S.H.T. at 7, 9-10, 12, 23, 32 (Trooper Crandall); 39, 42 (Linda Thornton); 58-59 (Constable Hartford)). Chicken-wire

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Rules of Criminal Procedure) of the hearing held April 5, 1982 in Maine Superior Court (Somerset County) on Mr. Thornton's motion to suppress shall be in parentheses as follows: (S.H.T. at___).

fencing, approximately three to four feet high, enclosed each of the marijuana patches. (S.H.T. at 7, 17-18 (Crandall); 43-46 (Linda Thornton)). It was possible to see the marijuana plants by looking through as well as over the fencing. (S. H.T. at 7, 17-18 (Crandall); 54 (Linda Thornton)). Upon finding and observing the marijuana patches, the officers retraced their route back to their automobile. (S.H.T. at 25, 27). In walking to and from the marijuana patches, the officers did not see or come across any No Trespassing or No Hunting signs, fences, stone walls, or other indications that they were walking across property boundary lines. (S.H.T. at 11-12, 21, 35 (Crandall); 59 (Hartford)). However, Trooper Crandall did suspect that the marijuana patches were located on the property of Richard Thornton. (S.H.T. at 11-12).

After the officers returned to their vehicle, Trooper Crandall went to the Town Office in Hartland where, after examining the town property maps, he was able to determine that the marijuana patches were located on the property of Richard Thornton. (S.H.T. at 13). After securing a search warrant for which the probable cause was established at least in part by the officers' warrantless observation of the marijuana plants on Mr. Thornton's land, Trooper Crandall along with several other law enforcement officers returned to Mr. Thornton's house on August 3, 1981, gave Mrs. Linda Thornton - wife of Richard Thornton (S.H.T. at 37) - a copy of the search warrant (S.H.T. at 48-49), and walked back into the heavily wooded area behind Mr. Thornton's house to the two marijuana patches. The marijuana patches, located approximately 500 feet from the Thornton house and surrounded

by forest, were not visible from the Thornton house. (S.H.T. at 10-11, 17, 31 (Crandall); 55 (Linda Thornton)). On account of the forest on the Thornton's mostly wooded 38-acre rural property (S.H.T. at 38, 39, 40-41, 54 (Linda Thornton)) the two marijuana patches could also not be seen from the Thornton's driveway, the Davis Corner Road, or the property of the Thornton's neighbors. (S.H.T. at 44). The law enforcement officers seized 151 marijuana plants from the two marijuana patches and returned to Mr. Thornton's driveway by way of a footpath running from the patches to the driveway. (S.H.T. at 10-11, 27, 29-30).

On August 11, 1981, Richard Thornton was charged by complaint with unlawfully furnishing scheduled Z drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.) §1106. On February 23, 1982,

Respondent Thornton filed in Maine Superior Court (Somerset County) a motion "to suppress for use as evidence the observations made and property seized by law enforcement officers at the Defendant's property on August 3, 1981." The Respondent's motion was based in part on the following contentions: "1. There was an illegal search of Defendant's property; 2. The observations were made and the property was seized without a valid warrant...." A hearing on Respondent's motion to suppress was held April 5, 1982 in Maine Superior Court (Somerset County) before Superior Court Justice Morton A. Brody. At the outset of the hearing Petitioner State of Maine (1) stated that the first issue raised by Respondent's motion to suppress was "whether the Fourth Amendment applies at all, on the open field issue" and (2) was unwilling to stipulate that the warrantless visit of Trooper Crandall and Con-

stable Hartford to Thornton's property on the morning of August 3, 1981 as a "search" under the Fourth Amendment. (S. H.T. at 2). In Petitioner's closing argument at the end of the suppression hearing Petitioner reiterated that the warrantless entry by Trooper Crandall and Constable Hartford onto Respondent's property was in a rural wooded area beyond the curtilage of Respondent Thornton's house where Respondent had no reasonable expectation of privacy and that the warrantless entry was therefore "a permissible open field type of search" authorized by Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), and not governed by the Fourth Amendment. (S.H.T. at 60, 66-67).

Rejecting Petitioner's argument, the Superior Court Justice noted that "[t]he perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting." (The Superior

Court Justice's "ORDER" dated April 9, 1982, is included as Appendix B to this petition.) This finding was based on Linda Thornton's testimony at the suppression hearing that approximately ten No Trespassing-No Hunting signs were posted around the perimeter of the Thornton property. (S.H.T. at 41-43). Mrs. Thornton also testified that an old stone wall and an old barbed wire fence "go all the way around the property" (S.H.T. at 41); however, on cross-examination Mrs. Thornton acknowledged that in places the old stone wall had broken down and fallen into pieces. (S.H.T. at 52-53). The Superior Court Justice nevertheless concluded:

> As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The

> officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFave, Search & Seizure § 2.4 (1978)).

On appeal to the Supreme Judicial Court of Maine Petitioner contended once again that the "open fields doctrine" of Hester v. United States permitted the August 3rd warrantless entry into the wooded area behind Mr. Thornton's house, especially since Mr. Thornton lacked a reasonable expectation of privacy in the wooded area because the wooded area was well beyond the curtilage of Mr. Thornton's house. Petitioner also contended that the "reason-

able expectation of privacy" analysis set forth in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), does not diminish the continuing viability of Hester's "open fields doctrine." Petitioner additionally argued that the following three statements in the Superior Court Justice's "Order" dated April 9, 1982, were clearly erroneous:

> (1) "The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting."
>
> (2) "In entering upon the Thornton property on July 31, 1981, the two officers went partly up the driveway from the Davis Corner Road...."
>
> (3) "In entering upon the Thornton property on July 31, 1981, the two officers ... crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing."[2]

[2]Although not challenged on appeal, the Superior Court Justice's finding that

Addressing initially Petitioner's three challenges to the Superior Court Justice's findings of fact, the Maine Supreme Judicial Court stated that the above-quoted first and third findings of fact were not clearly erroneous. In regard to the above-quoted second finding of fact, the Maine Supreme Judicial Court stated in pertinent part:

> The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); State v. True, Me., 438 A.2d 460, 467 (1981) (preserved error harmless if 'appellate Court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of

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Trooper Crandall and Constable Hartford made their warrantless entry onto Mr. Thornton's property on July 31, 1981 is clearly erroneous. Both the transcript of the suppression hearing and Trooper Crandall's "AFFIDAVIT AND REQUEST FOR SEARCH WARRANT" make clear that the officers' warrantless entry occurred on August 3, 1981 - the same day that Trooper Crandall applied for, received, and executed the search warrant.

> unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Addressing Petitioner's contention that the "open fields doctrine" of Hester v. United States permitted the August 3rd warrantless entry into the wooded area behind Mr. Thornton's house, the Maine Supreme Judicial Court acknowledged that Katz's "reasonable expectation of privacy" analysis does not diminish the viability of Hester's "open fields doctrine" but nevertheless concluded that Mr. Thornton had a reasonable expectation of privacy in the marijuana patches.[3] In support of this

[3] Significantly, the Maine Supreme Judical Court cited State v. Brady, Fla. App., 379 So.2d 1294, 1295 (1980), for the

conclusion, the Maine Court noted that Mr. Thornton

> chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S. SUP.CT. RULE 17.1(c) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue decided by the Maine Supreme Judicial Court in this case, i.e., whether Hester's "open fields doctrine" applies to fenced and posted property located beyond

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following propositions: (1) "Katz did not rule out the open fields of Hester altogether," and (2) "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out."

the curtilage of a home, is an important unresolved question of federal law. It is the same issue that has been presented for review by the State of Florida's petition for certiorari in Florida v. Brady, U.S. Supreme Court Docket No. 81-1636.[4] Both

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[4]The Florida petition presents the following specific question for review:

> Whether the Florida Supreme Court correctly construed the Fourth Amendment to the United States Constitution by holding that the "open fields doctrine" of Hester v. United States, 265 U.S. 57 (1924) was inapplicable to the instant case, where contraband was seized from an 1,800 acre open field, just because the field was barbed wire fenced, locked, and posted?

This question is virtually identical to the question presented for review in the instant petition, namely:

> Did the Maine Supreme Judicial Court correctly construe the Fourth Amendment by holding that the "open fields doctrine" of Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), was inapplicable to the instant case, wherein a warrantless search occurred in a heavily wooded area of Mr. Thornton's 38-acre rural property which wooded area is beyond the curtilage of and not visible from Mr. Thornton's house,

the importance and the unresolved status of this federal issue are suggested by the fact that the State of Florida's petition for certiorari was granted by the United States Supreme Court on May 24, 1982. Florida v. Brady, 102 S.Ct. 2266.

The issue presented by this petition is important because the Fourth Amendment should not be interpreted - as the Maine Supreme Court has interpreted it in State of Maine v. Richard Thornton - to permit people to invoke its protections for illicit activities conducted beyond the curtilage of their homes by simply posting and fencing their property. In his concurring opinion in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), Mr. Justice Harlan stated that the application of Fourth Amendment protections rests on a

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just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property?

two-pronged analysis: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361, 19 L.Ed.2d at 588. In light of Justice Harlan's two-pronged test, simply because a person has fenced and posted his property located beyond the curtilage of his home and thereby manifested a subjective expectation of privacy does not convert an otherwise open field or rural forest into an area protected by the Fourth Amendment unless either society is prepared to recognize that subjective expectation as reasonable or there are additional circumstances which convert that subjective expectation into one that is objectively reasonable. Petitioner submits that on the facts of the instant case, wherein only approximately ten No Trespassing-No Hunting

signs were posted around the perimeter of Mr. Thornton's mostly wooded 38-acre rural property bounded in some places by an old broken-down stone wall and in others by an old barbed wire fence, Mr. Thornton's subjective expectation of privacy in his property, which was based completely on this posting and fencing, is not one that society is prepared to recognize, and should not be required by the courts to accept, as objectively reasonable.

That Trooper Crandall and Constable Hartford may have committed a trespass by their August 3rd warrantless entry onto Mr. Thornton's property does not somehow bring the marijuana patches within the scope of Thornton's Fourth Amendment protections. In Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), the Supreme Court recognized that the law enforcement officers in that case may have committed a trespass by their warrantless

entry onto what may have been Hester's father's land. The alleged trespass was irrelevant, however, to determining whether the officers had committed any Fourth Amendment violations because the critical issue was whether the Fourth Amendment even applied to the open fields. The Court concluded that it did not on the ground that the distinction between open fields and the "houses" protected by the Fourth Amendment "is as old as the common law. 4 Bl.Com. 223, 225, 226." 265 U.S. at 58-59, 68 L.Ed. at 900. By acknowledging the historical basis of this distinction, the Supreme Court implied what it would state expressly in dictum a year later, i.e.,

> The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543, 549 (1925). The implication in Hester is that the Fourth Amendment does not apply to areas beyond the curtilage of the home, even posted areas on which law enforcement officers would be committing a knowing trespass by entering, simply because the special protections of the Fourth Amendment were not intended at the time of the Amendment's adoption to extend to open fields or rural woods.

U.S.Sup.Ct. Rule 17.1(c) states that one reason considered by the Supreme Court in deciding to grant a petition for certiorari is:

> [w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court....

The relationship of Hester's "open fields doctrine" (i.e., the Fourth Amendment does

not apply to open fields) to Katz's "reasonable expectation of privacy" test (i.e., the Fourth Amendment applies to wherever there is a reasonable expectation of privacy) in regard to posted and fenced fields or woods beyond the curtilage of the home - the very relationship addressed by the Maine Supreme Judicial Court in the instant case - is an important and unsettled area of Fourth Amendment law requiring clarification by the Supreme Court of the United States. The instant petition should be granted because it presents this issue for review.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED PURSUANT TO U.S. SUP.CT. RULE 17.1(b) BECAUSE THE MAINE SUPREME JUDICIAL COURT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A FEDERAL COURT OF APPEALS.

That the Fourth Amendment issue decided by the Maine Supreme Judicial Court in State of Maine v. Richard Thornton has not

been settled by the United States Supreme Court is demonstrated by the conflict between the Maine Court's opinion and the decision in United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), wherein the Sixth Circuit, on a set of facts similar to Thornton, arrived at the opposite conclusion. Oliver entailed a warrantless entry by Kentucky State Police into a large fenced and posted farm area in which marijuana plants were found growing in secluded fields located approximately one and a half miles from Mr. Oliver's house. 686 F.2d at 358, 362. These secluded fields were bounded on all sides by woods, fences, and embankments. 686 F.2d at 362. Moreover, as in Thornton, the marijuana fields could not be seen by anyone standing on land other than Oliver's. 686 F.2d at 358, 362-63.

On these facts the Sixth Circuit held - in direct contrast to the Maine Supreme

Judicial Court's decision in Thornton - that Oliver did not have a reasonable expectation of privacy in the marijuana fields, notwithstanding their secluded location in a fenced and posted farm area. Quoting that portion of Justice Harlan's concurring opinion in Katz v. United States wherein Justice Harlan set forth his two-pronged "reasonable expectation of privacy" analysis for application of the Fourth Amendment, the Sixth Circuit then concluded "that under Hester and Katz any expectation of privacy that an owner might have with respect to his open field is not, as a matter of law, an expectation that society is prepared to recognize as reasonable." 686 F.2d at 360 (emphasis in original). A little later in its decision the Sixth Circuit stated: "The legal principles that protect privacy, therefore, do not protect the desert island, the mountain top or the open field - even one the owner has posted

with a 'no trespass' sign." 686 F.2d at 360. The Oliver decision, embodying a per se rule that an open field - even a secluded, fenced and posted one - inherently falls outside the scope of Fourth Amendment protections, is therefore in direct conflict with the Thornton decision wherein the Maine Court held that Mr. Thornton had a reasonable expectation of privacy in the wooded area containing his marijuana patches, and was therefore entitled to Fourth Amendment protections, because he had fenced and posted his property and grew his marijuana in a secluded location where the patches were observable only from his land.

U.S.Sup.Ct. Rule 17.1(b) states that one factor considered by the Supreme Court in deciding to grant a petition for certiorari is:

> [w]hen a state court of last resort has decided a federal

question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

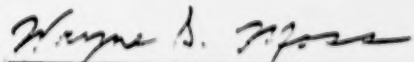
The instant petition should be granted because it entails a case where this factor is present, largely because the Fourth Amendment issue involved here has not yet been settled by the Supreme Court.[5]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Dated: January 28, 1983

Respectfully submitted,



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[5]The unsettled nature of this Fourth Amendment issue is reflected in the 5-4 split among the Sixth Circuit justices, sitting en banc, in United States v. Oliver.

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be served upon Donna Zeegers, Esquire, Respondent's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

Donna Zeegers, Esquire
DOYLE, FULLER & NELSON
P. O. Box 2709
Augusta, Maine 04330

Dated at Augusta, Maine, this 28th day of January, 1983.

WAYNE S. MOSS
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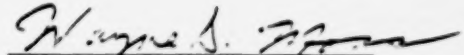
Counsel of Record

The single party to this proceeding required to be served, i.e., Respondent Richard Thornton, has been served.

Dated: January 28, 1983



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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3103
Law Docket No. Som-82-173

STATE OF MAINE

v.

RICHARD THORNTON

Argued September 22, 1982
Decided December 6, 1982

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, VIOLETTE, and WATHEN, JJ.

CARTER, J.

The defendant was charged with unlawfully furnishing scheduled drugs in violation of 17-A M.R.S.A. § 1106 (1981). The defendant filed a motion to suppress the observations made and the items seized at the defendant's property by the police. After a suppression hearing in Superior Court (Somerset County), the justice granted the defendant's motion. The State appeals, pursuant to 15 M.R.S.A. § 2115-A (Supp.

1979) and Rule 37B, M.R.Crim.P., the suppression order. We deny the appeal.

An unidentified informant contacted Hartland Constable Arnold Hartford. The informant stated that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in back of a mobile home in the area. Hartford contacted State Trooper Crandall. Both officers talked to the informant, who did not want to be involved in any prosecutorial activity and who did not know who owned the property on which the marijuana was growing.

On July 31, 1981, Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property[1] between

1. At the hearing, defense counsel tried to elicit testimony from both Crandall and Hartford that they had told counsel during telephone conversations that they had walked up the defendant's driveway to approach the patches. Crandall denied making that statement; Hartford initially did not remember but later denied making the statement.

the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found marijuana growing in two clearings fenced in with chicken wire. This entire area was heavily wooded, except for the two clearings for the marijuana patches; it was not possible to see the patches from the defendant's house, from his driveway, from the public road, or from neighboring land. In fact, a person would have had to search to find the way to the patches.

An old stone wall, an old barbed wire fence and No Trespassing signs exist around the perimeter of the defendant's property, including a sign where the woods road enters the defendant's property. It was, however, possible to enter the defendant's property without observing anything except the stone wall. The defendant did not let people walk routinely through his property and the

officers had no consent to enter the property on July 31, 1981. Although Trooper Crandall did not observe any boundaries or signs indicating the limits of the defendant's property, Trooper Crandall "figured" the marijuana was growing on the defendant's property because Crandall had observed marijuana on defendant's property in 1980.

After determining that the plants were marijuana, the officers left the property. Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. On August 3, 1981, Trooper Crandall filed an affidavit and obtained a warrant to search the defendant's property for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observations of marijuana on the defendant's property, on the July 31, 1981 observations, and on the information supplied by a "reliable, cooperating citizen." When asked by the suppression court justice why

a warrant had not been procured before the July 31, 1981 visit to the property, Trooper Crandall replied: "I didn't know exactly where the marijuana was. I didn't know whose property it was on, and I didn't feel without checking it that I had enough information." Later, on August 3, 1981, the officers returned to the clearings on the defendant's property and seized the marijuana.

In his order, the suppression court justice found that because the District Attorney had abandoned any effort to prove probable cause for the warrant based on the informant's testimony, sufficient probable cause for a valid warrant depended on Crandall's observations. The justice further found that because the District Attorney had conceded that Crandall's July 31 visit was a warrantless search, the central issue in the motion to suppress determination was whether the July 31 search came within an exception to the warrant requirement.

The suppression court justice concluded that the two officers had entered the defendant's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along the defendant's property and then crossing a stone wall, which was in a state of disrepair. The officers entered the property without license in order to corroborate the informant's tip. The secluded location, chosen by the defendant for the patches, and the defendant's efforts to exclude the public from his property evidenced the defendant's reasonable expectation of privacy on his property. Because the officers were not innocently on public property, property of unknown ownership, or neighboring property, and because no other exception[2] to

2. The burden was on the state to prove an exception to the warrant requirement. State v. Linscott, Me., 416 A.2d 255, 259 (1980); State v. Dunlap, Me., 395 A.2d 821, 824 (1978).

The five basic exceptions include: consent, Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973);

the warrant requirement was applicable, the justice found that the officers' July 31 visit to the defendant's property was an unlawful search. After finding that the information obtained in Crandall's 1980 search was stale in 1981 and may also have been obtained during an unlawful search and that the observations made during the July 31 unlawful search could not supply probable cause, the justice ruled that the warrant issued for the August 3 search and seizure was invalid. He, therefore, suppressed evidence of observations made and items seized on the defendant's property on August 3.

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incident to a lawful arrest, Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); probable cause and exigent circumstances, United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); hot pursuit, Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); and stop and frisk, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "plain view doctrine" is not an exception to the warrant requirement. Rather, this doctrine allows the police to seize evidence in plain view, inadvertently observed by the police while lawfully searching with respect to another crime or purpose. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, reh'g denied, 404 U.S. 874 (1971).

On appeal, the State contends: (1) three of the suppression court justice's findings of fact are clearly erroneous; (2) the defendant could have had no reasonable expectation of privacy; and (3) the suppression justice erred in questioning and failing to apply the "open fields" doctrine. We disagree.

I. Findings of Fact

The State challenges as clearly erroneous three findings of fact by the suppression justice. Findings of fact supporting a suppression order by a Superior Court justice will not be set aside unless clearly erroneous. State v. Dunlap, Me., 395 A.2d 821 (1978). The justice found that the defendant's property was posted with signs prohibiting trespassing and hunting. The defendant's wife testified directly to the fact that such signs were posted on the defendant's property. The defense also offered in evidence a photograph of a No Trespassing sign on the defendant's property.

Second, the justice found that the two officers went partly up the defendant's driveway en route to the marijuana patches during the July 31 visit. In fact, the officers denied using that driveway. Evidence was introduced that they had used some driveway. The suppression justice was not compelled to accept the officer's testimony on the point, even if it was uncontradicted. Qualey v. Fulton, Me., 422 A.2d 773, 775 (1980). The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); State v. True, Me., 438 A.2d 460, 467 (1981) (preserved error harmless if 'appellate court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was

posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Third, the justice found that the two officers crossed a stone wall in disrepair when entering the defendant's property. The defendant's wife testified that although the stone wall was dilapidated, a person would know he was going over a wall when entering the property in the area where the officers entered the property. Trooper Crandall's testimony that he did not see any fences or boundaries did not compel rejection by the suppression justice of the testimony of the defendant's wife. The finding of the justice was not clearly erroneous. State v. McKenzie, 161 Me. 123, 134-35, 210 A.2d 24, 31 (1965) (clearly erroneous test

is that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'").

II. Reasonable Expectation of Privacy

The suppression court justice found that the defendant's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The officers' warrantless search was, therefore, an unreasonable invasion of the defendant's privacy. State v. Blais, Me., 416 A.2d 1253, 1256 (1980). This violation of the defendant's fourth amendment rights also tainted the subsequent warrant and search. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The State relies on Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); State v. Peakes, Me., 440 A.2d 350 (1982); and State v. Dow, Me., 392 A.2d

532 (1978) and argues that the defendant could not have a reasonable expectation of privacy in an area accessible to the public because fourth amendment protection does not extend to "open fields" and similar areas. The State concludes, therefore, that there was no search by the officers on July 31,[3] Peakes 440 A.2d at 353; that they observed only what was "open and patent," State v. Poulin, Me., 268 A.2d 475, 480 (1970), and that these observations provided the basis for a valid search warrant used on August 3.

3. In his order, the suppression court justice stated that the District Attorney had conceded that the July 31 visit was a warrantless search and that the only issue was whether an exception to the warrant requirement applied. Although the State disputes this finding, the following exchange indicates either a concession on, or a waiver of, the issue of the occurrence of a search:

> [Defense counsel]: Your Honor, the affidavit of the police officer states that he went into the property and saw the marijuana, and then got a search warrant, it is fairly clear.
>
> [Prosecutor]: There is no question but what that happened.
>
> The Court: You have the burden of going forward, in that event, [Prosecutor].
>
> [Prosecutor]: Yes, Your Honor.

The State misconstrues these cases. In Katz, the Court made clear that the fourth amendment protection against unreasonable searches and seizures is a function of an individual's expectation concerning his activities and the reasonableness of those expectations: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection... [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351, 88 S.Ct. at , 19 L.Ed.2d at 582; State v. Sweatt, Me., 427 A.2d 940, 946 (1981).

In his concurrence in Katz, Justice Harlan recognized that the majority's seeming personalization of the fourth amendment was not inconsistent with the prior cases. Citing Hester, Justice Harlan reasoned that activities conducted in the open are not

protected because even if there was an expectation of privacy, the expectation would be unreasonable. 389 U.S. at 388, 88 S.Ct. at , 19 L.Ed.2d at 588.

The Maine cases are in accord. We noted after Katz that

> [t]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area... than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.

State v. Gallant, Me., 308 A.2d 274, 278 (1973) (radiographic scanning by customs of official mail entering country not search); United States v. Miller, 589 F.2d 1117, 1125 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979) (no reasonable expectation of privacy because boat, like automobile, carries lesser expectation of privacy than home or office); United States v. Taylor, 515 F.Supp. 1321, 1326 (D. Me. 1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); United

States v. Hensel, 509 F.Supp. 1376, (D. Me. 1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); United States v. Balsamo, 468 F.Supp. 1363, 1378 (D. Me. 1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy); Peakes, 440 A.2d at 352-53 (officer's observation of defendant's marijuana from neighbor's land not search); State v. Sapiel, Me., 432 A.2d 1262, 1266 (1981) (officer's proper entry on premises not violation of justifiable property interest; observation of evidence in plain view not search); State v. Rand, Me., 430 A.2d 808, 818 (1981) (absent exigent circumstances, fact that police are conducting official investigation does not justify intrusion on private property in breach of reasonable expectation of privacy); Sweatt, 427 A.2d at 945 (legitimate expectation of privacy in safe and contents; secrecy is not requisite for legitimate expectation of privacy); State v.

Albert, Me., 426 A.2d 1370, 1373 (1981) (any conceivable expectation of privacy with respect to car had ceased when police searched three weeks after car had left defendant's possession and control); Blais, 416 A.2d at 1256 (no search warrant required if State establishes absence of any reasonable expectation of privacy); State v. Johnson, Me., 413 A.2d 931, 933 (1980) (knowledge of dead body on premises created exigent circumstances permitting warrantless entry); State v. Littlefield, 408 A.2d 695, 697 (1979) (no search when defendant observed walking along public street); State v. Barclay, Me., 398 A.2d 794, 798 (1979) (necessary difference between search of store or dwelling house and search of ship, boat, wagon or car); State v. Dow, Me., 392 A.2d 532, 535 (1978) ("[o]pen, obvious and notorious criminal activity conducted in a public place has never been accorded constitutional protection under the fourth amendment"; warden's

observations of short lobsters open to public view not search); State v. Cowperthwaite, Me., 354 A.2d 173, 175-76 (1976) (observation of shotgun, cartridge, and hunting knife by officer standing at open door of vehicle not search); State v. Hamm, Me., 348 A.2d 268, 272 (1975) ("[t]he Court in Katz broadened the scope of fourth amendment protection to include those areas which the individual attempts 'to preserve as private'"); State v. Crider, Me., 341 A.2d 1, 4 (1975) (no invasion of privacy when police enter without force common hallway of multiple-unit dwelling in furtherance of investigation); State v. Koucoules, Me., 343 A.2d 860, 868 (1974) (search exceeding bounds of consent to search becomes invasion of privacy rendering search unreasonable); State v. Richards, Me., 296 A.2d 129, 134 (1972) (governmental rummaging about in citizen's belongings, even without purpose of seeking criminal violations, is search); State v. Stone, Me., 294 A.2d 683, 688-89 (1972) (rifle on back seat of auto-

mobile was knowingly exposed to public view; observation not unconstitutional intrusion into protected area); Poulin, 268 A.2d at 480 (observation of safe in open automobile trunk not search); McKenzie, 161 Me. at 137, 210 A.2d at 32 (not search to observe that which is open and patent).

Depending on the circumstances and the conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth, Katz, 389 U.S. at 348, 88 S.Ct. at , 19 L.Ed.2d at 580, and an unreasonable expectation of privacy at home. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), reh'g denied, 386 U.S. 939 (1967). In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

It has never been the law in this State that any expectation of privacy for activity conducted in an area accessible to the public is per se unreasonable. Rather, the proper inquiry must be

> [h]aving in mind the purpose to be served by the Fourth Amendment, made applicable to the states by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if anything, wholly defeated or partially reduced under the law the reasonable expectations of privacy which the occupants... had a right to entertain?

Crider, 341 A.2d at 5. Under the circumstances of this case, we find nothing that can be taken to have wholly defeated or partially reduced the defendant's reasonable expectation of privacy except the visit by the officers to the property for the specific and admitted purpose of gathering information for a subsequently procurred [s.c.] search warrant.

III. The "Open Fields" Doctrine

The State contends, finally, that (1) the suppression court justice clearly erred in applying the "Katz expectation of privacy analysis" to this case because the case is governed by the "'open fields' doctrine analysis developed in Hester..."; and (2) the justice clearly erred in questioning the viability of the doctrine of Hester, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. In his order, the justice did observe, parenthetically, that "[t]he extent to which the open fields doctrine is still viable after Katz... is open to considerable doubt." This observation was preceded, however, by the finding that neither "the plain view or open fields exception to the warrant requirement is applicable."

We have recently noted that after Katz, the "Hester doctrine remains entirely intact" in Maine and elsewhere. Dow, 392 A.2d at 536. Regardless of his estimations of the doctrine's viability, the suppression

justice applied the law of the State and found inapplicable the "open fields" exception to the warrant requirement. His conclusion concerning the availability of this exception under these circumstances was correct.

In Maine, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued, Peakes, 440 A.2d at 353 ("the officers observed something which was 'open and patent' to the Defendant's neighbors and their invitees"); Dow, 392 A.2d at 535 (open, obvious criminal activity conducted in public place not constitutionally protected); and (2) the lawfulness of the officers' presence during their observations of what is open and patent. Dow, 392 A.2d at 535 ("[t]he warden, who apparently had as much right to be in the parking lot as the defendants, merely observed that which

was completely open to public view..."); Peakes, 440 A.2d at 353 ("the Waldoboro officers had permission to be where they were when they saw the marijuana plants"); Stone, 294 A.2d at 689 ("without any unlawful initial intrusion into the interior of the automobile, Trooper Smith saw, as knowingly exposed to public view (even though inside the automobile) a 30 calibre carbine rifle...").

Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. Katz, 389 U.S. at 351-52, 88 S.Ct. at , 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute

a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine. The defendant made every effort to conceal his activity; nothing about his enterprise was open, patent, or knowingly exposed to the public. Secondly, the officers were never legitimately on the defendant's property; they entered the defendant's land without a warrant, and within no exception to the warrant requirement, for the specific purpose of verifying information to be used, ultimately, against him.

Further, we note that the State's erroneous assumption that the fact that the scene of the criminal activity occurred in an area akin to an "open field" precludes the need for further fourth amendment analysis. The determination of a lawful search and seizure under fourth amendment analysis does <u>not</u> involve plugging in one

of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely a determination of fourth amendment protection involves a more cohesive and reasoned approach.

Although separated by forty-three years, the Hester doctrine and the Katz doctrine can be reconciled; indeed, such reconciliation is required. Dow, 392 A.2d at 536; State v. Brady, 379 So.2d 1294, 1295 (Fla. 1980) ("Katz did not rule out the open fields of Hester altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." Brady, 379 So.2d at 1295. There is little doubt that the Katz majority would have agreed that Hester had no reasonable expectation of

privacy in distributing moonshine whiskey in an open field on his father's land. Katz, 389 U.S. at 361, 88 S.Ct. at , 19 L.Ed.2d at 588 (Harlan, J., concurring).

The point is not that the area of the marijuana patches was accessible to the public, Katz, 389 U.S. at 361, 88 S.Ct. at , 19 L.Ed.2d at 588 (Harlan, J., concurring), or that, under different circumstances, the defendant's land might have been open woods. The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place. Under these facts, we think that that expectation was reasonable. Trooper Crandall "figured" the marijuana was on the defendant's land. The two officers walked directly to the chicken-wire enclosures; it was not possible to observe the patches except from such close proximity. The officers were "checking" the property, without permission or authority, to ensure "enough information." This conduct was a

search; the State has not proved the reasonableness of this search. Linscott, 416 A.2d at 259. An unreasonable search, under every doctrine and theory, is proscribed by the fourth amendment.

The entry is:

Judgment affirmed.

All concurring.

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APPENDIX B

Date filed: April 16,1982

STATE OF MAINE
SOMERSET, SS.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR82-10

STATE OF MAINE)
)
vs.) ORDER
)
RICHARD THORNTON)

This criminal action is before the Court upon the defendant's motion to suppress the fruits of a search of his property in Hartland, Maine, conducted by law enforcement officers on August 3, 1981, pursuant to a search warrant issued that day.

At the hearing on April 5, 1982, the Court heard the testimony of the affiant officer, Trooper Carol Crandall, Constable Harold Hartford, and Linda Thornton, the defendant's wife. The affidavit indicates that, relying upon information supplied by a "reliable cooperating citizen," who claimed to have observed marijuana plants

growing in a penned area in woods behind the defendant's residence on the Davis Corner Road, Hartland, Trooper Crandall went to that area of the defendant's property on July 31, 1981 and discovered marijuana plants to be growing. Additionally, the affidavit claims that approximately one year previously, that is, in the summer of 1980, Trooper Crandall had observed marijuana growing on other locations on the defendant's property. Constable Hartford accompanied Trooper Crandall on his visit to the Thornton property on July 31, 1981.

The District Attorney, at the hearing on this motion, abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, or any evidence of

corroborating circumstances as to the informant's observations, appears in the affidavit or was introduced at the hearing, beyond a conclusionary allegation of reliability. Absent such support for the informant's tip, probable cause for the warrant must be based upon the observations of the affiant officer.

The central issue on this motion, then, is whether the visit by Trooper Crandall to the defendant's property on July 31, 1981, which the District Attorney concedes was a warrantless search, comes within any exception to the warrant requirement of the Fourth Amendment of the United States Constitution. The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and the observations made could not serve to provide probable cause for the warrant.

The evidence indicates that the wooded area where the marijuana was growing, within two fenced and cleared enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of the defendant's 30 acre, rural property. (See Defendant's Exhibit #12) The enclosures were not visible either from the public road, called the Davis Corner Road and forming part of the defendant's southern boundary, from the defendant's driveway or residence in the eastern part of the property, or from any other point outside the defendant's property, upon neighboring land. The distance from the house, which has an entrance only on the east, or driveway side, to the two enclosures in the west was at least several hundred feet. The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting. In entering upon the Thornton property on July 31, 1981, the two officers went

partly up the driveway from the Davis Corner Road, and then crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing. The testimony of Trooper Crandall and Constable Hartford indicates that they had no license to be on the Thornton property; their intent was to corroborate the informant's tip. As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way),

or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFave, Search & Seizure § 2.4 (1978)). The case of Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), relied upon by the State, presents a different fact situation. There, the government pollution inspector saw plumes of smoke that were exposed to public view in the adjacent city, and then entered upon a part of the defendant's premises to which the public was not excluded in order to conduct tests.

Accordingly, the Court finds that the warrantless search of July 31, 1981 was an unreasonable and unlawful violation of the defendant's rights and the observations from it cannot provide probable cause for the subsequently issued warrant. Neither can the information obtained in the 1980 search alluded to in the affidavit provide probable cause for the warrant; that information was not only stale in 1981, but may also have been the fruit of an unlawful, warrantless search. The warrant having issued without probable cause, the search and seizure of August 3, 1981 pursuant to it was thus in violation of the defendant's Fourth Amendment rights.

The motion to suppress is GRANTED. It is hereby ORDERED and DECREED that all articles and items of evidence of every kind and description that were unlawfully seized from the property of the defendant and the defendant's premises at Hartland,

Maine, shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed; all statements and/or admissions both oral and written that may have been made by the defendant as a result of said illegal search and seizure shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed.

Dated: April 9, 1982

Morton A. Brody
Justice, Superior Court